No. 96-124

(3)

Supreme Court, U.S.
FILED
SEP 3 1996
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Of Counsel:

SUSAN BUCKLEY
ANNE B. CARROLL
CAHILL GORDON & REINDEL
New York, New York

RAYMOND V. MILLER
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN, P.A.
Miami, Florida

ALAN N. BRAVERMAN
STEPHANIE S. ABRUTYN
AMERICAN BROADCASTING COS., INC.
New York, New York

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

Rule 29.6 Statement

American Broadcasting Companies, Inc. is a wholly owned subsidiary of ABC Holding Company, Inc., a wholly owned subsidiary of Capital Cities/ABC, Inc., which, in turn, is a wholly owned subsidiary of The Walt Disney Company.

TABLE OF CONTENTS

PAGE

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONERS 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

PAGE

Aetna Casualty and Surety Co. v. *Home Insurance Co.*, 882 F. Supp. 1355 (S.D.N.Y. 1995) 5

Agee v. *Paramount Communications, Inc.*, No. 93 Civ. 6348 (CBM), 1996 WL 391868 (S.D.N.Y. July 11, 1996) 5

Bailey v. *Blue Cross/Blue Shield*, 878 F. Supp. 54 (E.D. Va. 1995) 5

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 3

City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 8

Espirito Santo Bank v. *Kyriakides* (*In re Kyriakides*), 177 B.R. 1020 (Bankr. S.D. Fla. 1995) 5

Krowlikowski v. *Volanti*, No. 95 C 1254, 1996 WL 451307 (N.D. Ill. Aug. 7, 1996) 5

Montana v. *United States*, 440 U.S. 147 (1979) 3, 3n

Parklane Hosiery Co., Inc. v. *Shore*, 439 U.S. 322 (1979) 3

Stolz v. *American International Life Assurance Co.*, 922 F. Supp. 435 (W.D. Wash. 1996) 5

United States v. *Williams*, 504 U.S. 36 (1992) 8

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994) .....*passim*

PAGE

Rules:

Fed. R. Civ. P.

Rule 24(a) 2, 4

Rule 50 7

Rule 59 7

Rule 60 ..... 5n, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-124

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

We emphasize at the outset what cannot be disputed.

The practical effect of the circuit split as to intervention is to deny in the Eleventh Circuit and elsewhere to third parties with the most direct interest in the preclusive impact of duly entered judgments the opportunity even to be heard to oppose settlement-dictated vacatur of those judgments. This case offers the best illustration of the worst result of that rule of law. Yet none of the respondents chooses to address the point. Here, the "settlement" was nothing but a purchase by BFC of the full judgment entered against it in return for the vacation of that judgment. The court of appeals was unambiguous

about this. App. 4a. So, now, is BFC, which confirms that "the class wanted to settle for the amount of the verdict" and that BFC itself "was willing to settle for that amount and forego its right to an appeal," but only in return for the vacation. BFC Opposition Brief ("BFC Br.") at 7, 9. Since it is undisputed that if the principles set forth by this Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994), do apply in this case, the vacatur here cannot be sustained as a matter of law, the peculiarly harmful impact of the Court's ruling on intervention is all the more evident.

Respondents who prevailed in the securities fraud action below (collectively "Purcell") focus the bulk of their argument on an effort to show that this case is not worthy of this Court's review by urging (as their co-respondents do not) that there is no significant split among the circuit courts with respect to the kind of "interest" required for intervention of right. Purcell Brief in Opposition ("Purcell Br.") at 12-22. In doing so, they succeed only in underscoring the elusiveness of the principles used by lower courts to determine the necessary level of interest, the utter unpredictability of results, and the consequent need for this Court's guidance on the question. More important, they do not and cannot refute the reality that the Eleventh Circuit as well as other courts of appeals consistently limit intervention of right to "real parties in interest," while others, such as the D.C. and Ninth Circuits, consistently apply far less demanding standards under Rule 24(a). *See* ABC Petition at 16-21.

In contrast, BFC offhandedly comments that the circuit conflict "may be more linguistic than real," BFC Br. at 21, but does not take issue with ABC's analysis of the division among the circuits. Rather, BFC's challenge on the Rule 24(a) question is largely confined to the circular assertion that the stringent test used by the Eleventh Circuit to deny intervention to ABC was correct because ABC's interest in the collateral estoppel effect of the *Purcell* verdict and judgment on

the *Levan* libel suit ought not to be held sufficient to justify intervention to preserve that effect.

In the same vein, both respondents try to avoid scrutiny of the ruling below by asserting that this case is too mundane for review. BFC calls the Court of Appeals' holding a "garden variety intervention decision" that does not implicate "any issues of broad public interest." *Id.* at 20. This is, at bottom, an argument that the preclusive impact of a prior disposition, though concededly powerful enough to terminate a second litigation altogether, is nonetheless too insignificant to undergird intervention, let alone to warrant this Court's time and attention. But such a position cannot begin to be squared with this Court's past pronouncements about the significance of the preclusion doctrine in general, *see Montana* v. *United States*, 440 U.S. 147, 153-54 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971), and of the offensive use of non-mutual collateral estoppel in particular, *see Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322 (1979).[1]

BFC urges that the creation of an "absolute right of intervention" would produce an "outlandish rule of sweeping and unprecedented impact." BFC Br. at 23. These professed fears could have some basis if (as is not the case) ABC were asking

---

[1] As this Court stated in *Montana*, explicating the principles of *Parklane Hosiery*, under the doctrine of collateral estoppel,

> once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . . *Application of [the] doctrine[] is central to the purpose for which civil courts have been established*, the conclusive resolution of disputes within their jurisdictions. . . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. at 153-54 (1979) (citations omitted) (emphasis added).

the Court to determine that Rule 24(a) authorizes intervention as of right prior to or during a trial itself, or even after a trial, based on the mere *possibility* that the prospective intervenor might somehow be affected by its outcome.[2] That, of course, is not what ABC sought to do or ever maintained it was entitled to do. ABC does not suggest that district judges should be stripped of their authority to determine when a claimed preclusion interest is so remote that intervention to protect that interest is unsustainable. Here, however, there is no question of remoteness at all. Neither respondent even takes issue with the conclusion of the Court of Appeals that but for the vacatur of the *Purcell* verdict and judgment, the libel action against ABC would properly have been dismissed as, indeed, the Magistrate had recommended prior to ABC's motion to intervene.

Respondents take still another tack when they maintain that *U.S. Bancorp* is "fundamentally irrelevant" to, or "readily distinguishable" from, this case because it addressed vacatur at the appellate court, rather than the district court, level. BFC Br. at 16-19, 21; Purcell Br. at 8-10. Nothing in the text of

---

[2] Purcell's suggestion that ABC avoided intervening in *Purcell* prior to the trial only so that it would not be precluded from defending the libel case, Purcell Br. at 5 n.3, not only lacks factual basis but is wholly without legal substance: how could ABC have intervened at all prior to the entry of a judgment (let alone prior to the trial itself) on a theory so conjectural it amounts to nothing more than the possibility that *some* jury verdict could conceivably be of *some* preclusive benefit to it? In contrast, BFC suggests that ABC only sought to intervene in *Purcell* to avoid defending the broadcast. BFC Br. at 19 n.3. The same could be said of any party seeking to assert a collateral estoppel defense. In a similar vein, BFC's repeated quotations from and citations to the *Levan* Magistrate's views on the broadcast, BFC Br. at 7-8, are not only irrelevant but also wholly improper. That part of the Magistrate's first Report and Recommendation was referred back to the Magistrate for reconsideration by the district court, Order on Defendants' Objections to the Magistrate's July 22, 1993 Report and Recommendation, August 31, 1994, at 1, notwithstanding BFC's disingenuous suggestion to the contrary, BFC Br. at 8 n.2. Upon reconsideration, the Magistrate did not see fit to repeat any of his earlier remarks. BFC App. at 19a-33a.

U.S. Bancorp lends support to so constricted a reading. Nor have federal trial courts so read it. *See, e.g., Krowlikowski* v. *Volanti*, No. 95 C 1254, 1996 WL 451307, at *2-*4 (N.D. Ill. Aug. 7, 1996); *Agee* v. *Paramount Communications, Inc.*, No. 93 Civ. 6348 (CBM), 1996 WL 391868, at *1-*3 (S.D.N.Y. July 11, 1996); *Aetna Casualty and Surety Co.* v. *Home Insurance Co.*, 882 F. Supp. 1355, 1356-58 & nn.5, 8 (S.D.N.Y. 1995); *Bailey* v. *Blue Cross/Blue Shield*, 878 F. Supp. 54, 55-56 (E.D. Va. 1995); *Stolz* v. *American International Life Assurance Co.*, 922 F. Supp. 435, 435-37 (W.D. Wash. 1996); *Espirito Santo Bank* v. *Kyriakides* (*In re Kyriakides*), 177 B.R. 1020, 1021 (Bankr. S.D. Fla. 1995). As one of these courts put it,

> [B]y conditioning the waiver of an appeal upon the vacatur of the decision in this matter, the parties have placed in issue the integrity of the judicial process. . . . If [the losing defendant] wishes to avoid the adverse effects of an unfavorable decision, the better method to employ here is judicial review by the [Court of Appeals].

Aetna Casualty, *supra*, 882 F. Supp. at 1358.[3]

Other attempts by BFC and Purcell to show that their vacatur lies outside the realm of *U.S. Bancorp's* concerns fail as well. The assertion that the *Purcell* settlement should stand because its terms are advantageous to both parties, BFC Br. at

---

[3] Indeed, if respondents are to be heard seriously to maintain that *U.S. Bancorp* has no application when a district court (as opposed to an appellate court) is asked to vacate a judgment in a case, that counsels in favor of the exercise of this Court's jurisdiction to provide guidance on the issue. To be sure, as respondents urge, the district courts continue to have power under Rule 60(b) to vacate judgments under the standards set forth in the Rule, but none of the respondents has even suggested that there were such grounds in this case. Thus, respondents' argument boils down to the notion that even if a Rule 60(b) motion would not lie before a district court, *U.S. Bancorp* still does not apply and would permit verdicts and judgments to be purchased and sold at will so long as the deals are effectuated before appeal.

5-7, Purcell Br. at 4-7, simply misses the point of *U.S. Bancorp*. Parties presumably always believe that settlements to which they agree are in their interest; they would not otherwise agree to settle. *U.S. Bancorp* does not say that vacatur dictated by settlement is improper only where the other settlement terms are unfair or foolish. It holds that in the absence of "exceptional circumstances"—circumstances that do *not* include the desire of the loser to erase a disagreeable ruling by manipulating the judicial process—parties to a litigation may not use settlement as a means to expunge judgments from public records and thus to usurp the public benefit of those judgments. 115 S. Ct. at 393. Indeed, it is precisely because none of the respondents can demonstrate—or have even attempted to demonstrate—the existence of exceptional circumstances here that they argue that this Court's decision in *U.S. Bancorp* simply does not apply to district courts at all.

BFC further urges the Court to deny the petition based on its assertion that it should have prevailed on the merits of the *Purcell* securities fraud case at trial and would have prevailed on appeal. BFC Br. at 2-7. Whatever the likely accuracy of these hindsight assessments, and however deeply BFC professes to believe that it "simply could not live with the erroneous verdict," *id.* at 6-7, it is at the core of *U.S. Bancorp* that the remedy of a party dissatisfied with a trial court disposition is *appeal*, not vacatur.[4]

---

[4] BFC's efforts to disparage the *Purcell* verdict and judgment by citation to oral comments of the *Purcell* judge in informal post-trial exchanges with counsel and to the vacatur order which BFC's own counsel wrote can hardly be credited. For one thing, the court made numerous other oral remarks in post-trial hearings wholly inconsistent with those on which BFC relies. The judge stated, for example, that "[o]f course, the people who voted no read the prospectus and immediately saw [w]hat this was voted no because of the time value of money. . . . Who wants something payable in 20 years? I would rather take less now."; and that "if I were given the option of taking $25 million which belonged to somebody else and giving them a note for $30 million say payable in 20 years with no interest due until the note is due, I think . . . I would take

BFC's contention that the principles of *U.S. Bancorp* can have no bearing here because the judgment entered by the *Purcell* court on the jury verdict was an "interlocutory order," BFC Br. at 18-19, is equally unavailing. While there is no doubt that as a general matter the discretion of district courts to vacate their own orders is broad, BFC cites no authority—and petitioners are aware of none—which countenances the vacation by a district court of a jury verdict of liability or a judgment entered upon such a verdict outside the framework of a motion made pursuant to Rule 50 (judgment as a matter of law), Rule 59 (new trial) or Rule 60 (relief from judgment or orders).[5] BFC's suggestion that the vacatur here fell within the district court's power to afford relief from a judgment in the interest of justice is simply another way of saying that a federal court may vacate a judgment, regardless of its value to third parties, only because one of the parties insists upon vacatur as a condition of settlement.[6] But that is the very conclusion rejected by *U.S. Bancorp*.

---

the $25 million and sign the note for 30 million, and furthermore, it's not backed by anything . . . and I think that's what any juror has to look at and has to say that's just not a good deal." R2-359-66, 101. Most importantly, in its post-trial written order, the district court ruled that "[t]his Court cannot say that the jury's verdict was irrational or without factual and evidentiary foundation, and has accordingly denied Defendants' motions for judgment as a matter of law and in the alternative for a new trial." App. 37a. Where a post-trial motion for judgment as a matter of law has been denied and no extraordinary circumstances intervene, it is specious to argue—as respondents do—that vacatur is appropriate on the basis of a potpourri of oral comments by the district court during the proceedings.

[5] Here, the first two motions had been denied by the district court and BFC neither had grounds for nor made the third.

[6] The fact that the Eleventh Circuit found the *Purcell* judgment to be insufficiently final for purposes of appeal—because it neglected to provide for the rescissionary relief which the class had sought along with money damages—did not figure at all in its subsequent decision that ABC was not entitled to intervene in *Purcell*. In fact, the Court of Appeals explicitly acknowledged that the *Purcell* judgment *would* collaterally estop the libel suit were it not vacated. App. 11a.

There remains only respondents' suggestion that certiorari should be denied because the applicability of *U.S. Bancorp* to this case was not expressly passed upon by the Court of Appeals. *See* BFC Br. at 14-15; Purcell Br. at 8. That contention has no impact at all on the need for this Court to resolve the outstanding circuit division as to when intervention as of right should be permitted. It is true that the Eleventh Circuit stated that because it had determined that ABC's intervention was properly denied, it would not reach the merits of ABC's argument regarding the propriety of the vacatur. App. 6a. Yet given the express basis of the decision below—the "insubstantial" nature of ABC's interest and the "public policy values . . . furthered by permitting parties to settle a case without the interference of interlopers," App. 9a—the Court of Appeals did not so much fail to "reach" *U.S. Bancorp* as to *reject* that decision as a factor to be weighed in this case.

The applicability of *U.S. Bancorp* to this case was pressed by ABC below and fully briefed by the parties. To the extent respondents are hinting that the absence of any explicit consideration of *U.S. Bancorp* in the Court of Appeals' opinion below presents some jurisdictional or prudential bar to this Court's review, they are mistaken. *See, e.g., United States* v. *Williams*, 504 U.S. 36, 41-42 & n.2 (1992); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 3, 1996

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

Of Counsel:

SUSAN BUCKLEY
ANNE B. CARROLL
CAHILL GORDON & REINDEL
New York, New York

RAYMOND V. MILLER
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN, P.A.
Miami, Florida

ALAN N. BRAVERMAN
STEPHANIE S. ABRUTYN
AMERICAN BROADCASTING COS., INC.
New York, New York